MEMORANDUM

State of Alaska

Department of Law

Gary Gustafson
Director
Division of Land & Water Management
Department of Natural Resources

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SUBJECT: Dedicated easements in Rocky Lake subdivision

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By memorandum to our office dated August 30, 1988, you asked several questions with respect to the state's management authority over public easements in the Rocky Lake subdivision. Before answering your questions, a brief statement of the facts and relevant law may be helpful.

Rocky Lake is located near Big Lake in the Matanuska-Susitna Borough. The Division of Lands prepared a subdivision plat, called the "Rocky Lake Alaska Subdivision," for certain Rocky Lake uplands, which plat was approved by the Division Director on June 27, 1958. The Department of Natural Resources ("DNR") then offered 55-year land leases for a number of lots on Rocky Lake, on three different occasions: September 3, 1959; August 11, 1962; and October 26, 1967. These lease offerings were made under sec. 1, art. V, ch. 169, SLA 1959, as amended and later codified at AS 38.05.070. On December 2, 1963, before the third lease offering, the Division of Lands filed the "Rocky Lake Alaska Subdivision" plat with the Palmer Recording District. 1/ The subdivision plat shows three 60-foot roadways along the exterior boundaries of the subdivision and two 50-foot roadways within the subdivision.

When the plat was approved in 1958 by the Director of the Division of Lands, there was no platting authority in the Rocky Lake area. The state's current platting authority statutes originated in the 1953 Territorial Laws of Alaska, ch. 115.

1/ The DNR Plat File number was 63-31; it was filed with the recording district office under file number 63-3107. At that time the recording district offices were run as part of the court system. Today, of course, the Recorder's Office is part of the Division of Management of the Department of Natural Resources.

Section 1, ch. I, of ch. 115 required that "[e]ach subdivision or dedication, before any of its lots or tracts may be sold or offered for sale, shall first be submitted for approval to the authority having jurisdiction thereof, as herein prescribed ...." This statute was subsequently codified at AS 40.15.010. Platting authority was granted to cities and to school districts organized outside of cities. See sec. 1, ch. II, ch. 115, SLA 1953, later codified at AS 40.15.070. What would occur for lands located outside of the boundaries of a school district or city was not dealt with in the 1953 act, but that was corrected in 1955 when the territorial Legislature amended sec. 1 ch. I, ch. 115, SLA 1953 to indicate that where "no platting board or authority has in fact been appointed as provided in Chapter II of this Act lands may be sold without the approval as in this Act required." Sec. 1, ch. 95, SLA 1955. Thus, beginning in 1955 for lands located outside the platting authority boundaries of school districts and cities, the common law applied for determination of the dedication of streets, etc. 2/

In the context of Rocky Lake, there was no recognized platting authority in the area when the plat was approved by the Director of the Division of Lands in 1958. Nor was there one in the area when the division filed the subdivision plat on December 2, 1963. The Matanuska-Susitna Borough was not incorporated until January 1, 1964. See generally ch. 52, SLA 1963. As there was no platting authority to approve or disapprove the plat,

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2/ Pursuant to AS 01.10.010, "[s]o much of the common law not inconsistent with ... any law passed by the legislature of the State of Alaska is the rule of decision in this state." Under the common law, for a dedication of land to the public use to be complete, there must first be an offer of land by the grantor to the public and acceptance by the public. 6A R. Powell, The Law of Real Property ¶ 926[1] at 84-84 (1988). See also State v. Fairbanks Lodge No. 1392, 633 P.2d 1378, 1380 (Alaska 1981) (acceptance at common law can occur through official action, through public use, or by substantial reliance on the offer of dedication which would create an estoppel). Other courts have held that in the case of dedication by a plat, or by a sale by reference to a plat, no acceptance by a public authority is required to make the dedication effective, there having been a reliance interest created in the grantees such that it would be unfair to allow the grantor to back out of the dedication. See, e.g., Wenderoth v. City of Fort Smith, 510 S.W.2d 296, 297 (Ark. 1974); Banks v. Wilhoite, 508 S.W.2d 580, 582 (Ky. App. 1974).

common law principles applied in determining whether lands were dedicated to public use. Because the Rocky Lake uplands subdivider was the state, the common law "acceptance" of the "offer" of dedication of the roadways shown on the plat as dedicated 3/ to the public can be presumed to have occurred with the filing of the state-created plat by the Division of Lands. Of course, at least as long as the state remained the owner of all the lands involved, the act of filing the plat was mainly a land management exercise. Notwithstanding the plat, the Division of Lands retained management authority over all the lands. In other words, the division's filing of a plat did not in and of itself create any private rights.

As to whether private rights were created in the Rocky Lake Alaska Subdivision platted easements upon the state's sale of Rocky Lake subdivision lots, the required result seems to be clear:

> [T]here is considerable confusion in the decisions due to a failure to distinguish clearly between the effect of such a sale as between the grantor and the public. Strictly speaking, there can be no dedication to a private person, and, hence, it is improper to speak of the sale as a dedication as between the grantor and grantee, although often that is done. As between the grantor and grantee the situation is simply this: The grantor is estopped, as against the grantee, to deny the existence of such public places or to revoke his act of setting them aside for public use, and this is too well settled to require citation of authority, and it is doubtful if the rule has ever been denied so far as the rights between the grantor and the grantee are concerned. [Footnote

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3/ We note that AS 38.05.070(b), under which many of the lots were leased before being sold, required DNR to preserve "reasonable and traditional access to state land and water." Also, 11 AAC 54.280 (eff. July 1, 1960, Register 1; amended August 15, 1964, Register 18), AS 38.05.020, and AS 38.05.045 gave the Director the same authority in the context of land sales. Sample lease and sale documents for Rocky Lake which your office has provided us repeatedly refer to the "platted easements," and separate reservations for them are stated in the conveyance documents.

> omitted.] Furthermore, the rights of the grantee against the grantor do not depend upon whether the offer to dedicate, by such platting and sale, is accepted by the municipality. [Footnote omitted.]
>
> On the other hand, as between the grantor and the public, there is a conflict in the cases as to whether the sale is an acceptance of the offer to dedicate.

11 E. McQuillin, The Law of Municipal Corporations § 33.24, at 683 (3d ed. 1983) (emphasis supplied). See also State v. Fairbanks Lodge No 1392, 633 P.2d 1378, 1380 (Alaska 1981).

Thus, even if the courts were to hold that the state had not yet, under common law principles of dedication, dedicated to public use the easements shown on the Rocky Lake Alaska Subdivision plat 4/, as between the state as grantor of the subdivision lots and its private grantees as purchasers of the lots, it would seem likely that the courts would hold that the state was estopped to deny the grantees' right to use of the platted easements for ingress and egress.

This brings us to the reason for your questions. Since their initial leasing, many of the lots have been sold. In 1988, many of the current lot owners in the Rocky Lake subdivision petitioned the Matanuska-Susitna Borough Platting Board for vacation of one of the easements shown on the Rocky Lake Alaska Subdivision plat. The borough has for many years been authorized under AS 40.15 to be the local platting authority. At least one of the current landowners in the subdivision, whose lot does not abut the lake front, opposed vacation of the easement, apparently because it provides convenient access for this landowner to the lakeshore. The Platting Board approved the vacation, but subject to later Borough Assembly approval and a number of other stipulations, one of which included "[r]ecordation of vacation resolution signed by all parties holding ownership of a beneficial interest simultaneously with the final plat." Matanuska-Susitna Borough Assembly Memorandum 88-224 dated June 7, 1988, at 1.

4/ We believe such a court ruling would be highly unlikely given the many documents indicating state officials' belief in the existence of the easements, and public and private reliance on the easements which has developed over the years.

On June 21, 1988, the Matanuska-Borough Assembly rejected a motion to approve the Platting Board action vacating the easement. The Assembly apparently did so on the advice of a borough attorney who thought that, since the plat was filed in 1963 before the creation of the borough, the borough had no platting authority over any of the platted easements, and the easements remained under state management. Since then the landowner who opposed vacation asked DNR for authority to clear the controverted easement of brush to make vehicular access to the lakeshore easier.

You therefore asked whether the state has retained any "management authority" over the easements, and if so, what are the outer boundaries of that authority. The answer lies in AS 40.15.200:

> All subdivisions of land made by the state, its agencies, instrumentalities and political subdivisions are subject to the provisions of this chapter and AS 29.40.070 -- 29.40.160, or home rule ordinances or regulations governing subdivisions, and shall comply with ordinances and other local regulations adopted under this chapter and AS 29.40.070 -- 29.40.160 or former AS 29.33.150 -- 29.33.240, or under home rule authority, in the same manner and to the same extent as subdivisions made by other landowners.

The borough's platting authority powers are laid out in AS 29.40. AS 29.40.120 -- 29.40.160 grant the borough decision-making authority over the alteration and vacation of platted easements without regard to whom may have been the dedicator, or when the dedication may have occurred. It is only in areas where there is no platting authority that DNR retains platting powers. See AS 40.15.075. Thus, in our view the Matanuska-Susitna Borough ordinarily has authority to alter or vacate a platted easement which was initially dedicated to public use by the state under the common law. 5/

5/ In disposing of lands the state often reserves to itself in the conveyancing documents easements and other interests in the land as between it and its grantees. These reserved easements must be distinguished from dedicated platted easements. A platting authority does not ordinarily have the power to "vacate"
(Footnote Continued)

Perhaps the borough attorney was concerned about the retroactive application of the statutes granting the borough platting authority. However, the shift of plat management power from one governmental entity to another, or the imposition of a statutory platting regulatory scheme on easements which were initially dedicated to public use through the operation of common law principles, does not raise any problems with AS 01.10.090, which ordinarily bars the retrospective operation of statutes. See Matanuska Maid, Inc. v. State, 620 P.2d 182, 187 (Alaska 1980) (procedural changes that do not affect substantial rights are not immune from retrospective application); State v. Alaska Pulp America, 674 P.2d 268, 273 (Alaska 1983) ("modes of procedure" immune). A shift of easement-management rights from one governmental agency to another does not necessarily affect the substantial rights of any private party, and it does not mean that valid existing rights of private landowners can be affected without due process of law. Thus, the reasons for the rule against the retrospective application of statutes simply do not apply.

Should the borough vacate an easement in the Rocky Lake subdivision, the question arises what property rights will inure to the ownership of abutting landowners. The hornbook rule is that a statutory dedication conveys the whole estate of the dedicated lands to the public, whereas a common law dedication conveys only an easement, with the remaining portion of the estate's "bundle of sticks" of property rights left in the ownership of the dedicator. 6A R. Powell, The Law of Real Property ¶ 926[3], at 84-101-02 (1988). Although the territorial and later state platting statutes codified at AS 40.15 did not specify the interest conveyed by a dedication, i.e., whole estate versus easement, it did provide that upon vacation of the easement the land inured to the abutting landowners, clearly implying that the whole estate had been dedicated. AS 40.15.140 -- 40.15.180, dealing with vacation of dedicated streets, was repealed by sec. 1, ch. 118, SLA 1972. At the same time the latter Act enacted AS 29.33.240 (currently codified at AS 29.40.160), which again gave title to vacated streets to abutting landowners. Thus, it is very probable that the state and territorial legislatures intended that a statutory dedication of a street, accomplished under AS 40.15, conveyed the whole estate of the dedicator, and not just an easement. Otherwise, the

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(Footnote Continued)
a reserved easement as between a grantor and grantee, absent their consent.

relevant statutes' provision for conveyance of title to abutting landowners upon vacation would be problematic given that the estate encumbered by the easement would still be owned by the dedicator.

However, since the state's dedication of the easements in the Rocky Lake subdivision will probably be construed as having occurred under the common law, it is unclear how the courts would construe the easement dedication or its vacation. In the usual common law case the issue would be resolved by attempting to determine the intent of the grantor in making the dedication and evaluating subsequent reliance interests. This is not so easy to do, however, when the grantor is state government dedicating public lands to public use, and there are no state statutes or regulations defining the government's intent. In our judgment, nonetheless, we predict that the courts would probably decide that, with respect to streets dedicated under the common law in state subdivision plats, vacation of the easements will result in the fee estate inuring to the ownership of the abutting landowners 6/, just as it would under a statutory dedication. F. Clark, Law of Surveying and Boundaries §§ 603, 617-19, 628, 647 (4th ed. 1976).

The view that title to the vacated street would attach to the abutting land is supported by the statutory rules for construing real estate descriptions. AS 09.25.040 states, in pertinent part:

> The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it.
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> (4) When a road ... is the boundary, the rights of the grantor to the middle of the road ... are included in the conveyance, except where the road ... is held under another title.

6/ The ownership would not include interests in land reserved to the state by law, such as mineral interests reserved under AS 38.05.125.

This statutory rule of construction indicates the fee interest may be deemed conveyed to the owners of abutting land in the first place, subject to the dedicated access rights.

Given this conclusion -- which is admittedly only a prediction of what a court might conclude -- your remaining question dealing with the boundaries of any residual DNR power to manage the Rocky Lake Subdivision easements are all answered thus: since the Matanuska-Susitna Borough is now the "manager," DNR retains no residual management authority over the dedicated easement at issue. The state continues to hold, however, whatever easement interests (i.e., reserved easements) it may have under contracts of sale or deeds with particular grantees, which may or may not be affected by the platting power of the borough depending on the language of the conveyancing documents.

If you have any further questions, please let us know.

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